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No. 71-706

In the Supreme Court of the United States

OCTOBER TERM, 1971

LINCOLN ROY BUCKLEY AND EVERLAST SAW AND CARBIDE TOOLS, INC., PETITIONERS

v.

THOMAS C. GIBNEY, DEPUTY DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, FOR THE DISTRICT OF NEW YORK

EVERLAST SAW AND CARBIDE TOOLS, INC. AND LINCOLN ROY BUCKLEY, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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The facts are fully set forth in the opinion of District Judge Wyatt (Pet. Apps. B) and are not in dispute. Essentially, the individual petitioner, Lincoln Roy Buckley, a citizen of British Honduras, entered the

United States legally as a visitor on September 16, 1967, with permission to remain one month. In violation of the conditions of his entry he obtained employment in the United States and remained. Through various administrative and judicial proceedings he has attempted to prolong his stay (Pet. App. 17–20), but he has never become eligible for immigration nor has he any immediate prospect for becoming eligible.[1]

On January 18, 1971, the Deputy District Director issued a warrant for Buckley's deportation and on January 20 Buckley was directed to report for that purpose on February 2, 1971 (Pet. App. 19).

On February 4, 1971, Buckley and Everlast, his employer, filed in the United States District Court for the Southern District of New York the first of the two actions here involved (71 Civ. 470). The suit requested, *inter alia*, on various grounds, a preliminary injunction staying the enforcement by the Deputy District Director of the January 18 warrant of deportation (Pet. App. 20). On March 22, 1971, District Judge Wyatt, in an exhaustive opinion, found petitioners' various claims meritless, denied the requested injunction, and vacated a previously entered temporary restraining order (Pet. App. 17–26).

[1] 8 U.S.C. 1152(a) limits the visas available to any single foreign state to 20,000 per annum. Section 1152(c) charges persons born in dependencies to the governing independent state and limits the visas available to a dependency to one per cent of the maximum number available to the independent state. British Honduras, being a dependency of Great Britain, is thus statutorily entitled to a maximum of 200 immigrant visas annually, and those 200 are continually exhausted by applicants having higher preference status than petitioner (Pet. App. 17–18).

While the latter action was pending, Everlast sought on Buckley's behalf an administrative determination that Buckley was eligible for third preference classification for visa purposes ("qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States," 8 U.S.C. 1153(a)(3)). The application was denied by the Deputy District Director on February 23, 1971, and an appeal from that determination was dismissed by the Regional Commissioner on May 17, 1971 (R. 5, p. 4).[2] On May 25, 1971, petitioners filed in the district court a second civil action (71 Civ. 2315), requesting a declaratory judgment that Buckley qualifies for third preference status and a preliminary injunction staying enforcement of the deportation order pending determination of the principal action (R. 1, 2). On June 16, 1971, District Judge Croake, in a memorandum opinion, found that petitioners' claims had already been decided against them by Judge Wyatt and denied the requested injunction for the reasons stated in Judge Wyatt's opinion (Pet. App. 27).

The court of appeals affirmed both orders on the basis of the respective accompanying opinions (Pet. App. 15–16).

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[2] "R." refers to the record in Civil Action No. 71 Civ. 2315, S.D.N.Y., the second of the two proceedings involved. Both it and the record of the first action (71 Civ. 470) are on file in the Clerk's office.

Each of petitioners' contentions is answered in Judge Wyatt's carefully considered opinion (Pet. App. 17–26), on which we rely. We merely note two points which should be particularly stressed. With respect to petitioners' claim that the establishment of different quota limitations for Western Hemisphere aliens, depending upon whether they were born in dependent or independent countries, violates due process (Pet. 10–11), we note the plenary and unfettered character of Congress' constitutional authority to prescribe the terms under which aliens may be admitted to this country.[3] With respect to the contention that the Service's Operating Instructions improperly distinguish between possessors of third preference and sixth preference immigrant status in giving guidance to Service officers as to whether and for how long to extend the privilege of voluntary departure to aliens found to be deportable (Pet. 12–13), we emphasize that the Instructions are merely guidelines for the exercise of discretion, not hard and fast rules, so that even if Buckley had qualified for third preference status he would not necessarily have been granted the privilege of voluntary

[3] See, *e.g.*, *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 123; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–589; *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Turner* v. *Williams*, 194 U.S. 279, 289–290; *The Japanese Immigrant Case*, 189 U.S. 86, 97; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 704–713; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *The Chinese Exclusion Case*, 130 U.S. 581, 603–604; *Hitai* v. *Immigration and Naturalization Service*, 343 F. 2d 466, 467–468 (C.A. 2), certiorari denied, 382 U.S. 816.

departure—either for a definite or an indefinite period. Here, as Judge Wyatt noted (Pet. App. 22–23), there was ample reason for the Service, after Buckley had been granted the privilege of voluntary departure and had abused it, to decline to extend the privilege to him again.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

GOVERNMENT PRINTING OFFICE: 1972